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BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

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Federal Communications Commission
Office of Secretary

In the Matter of)

Amendment of the Commission's Rules)
to Establish Part 27, the Wireless)
Communications Service ("WCS"))

GN Docket No. 96-228

REQUEST FOR WAIVER OF UPFRONT PAYMENT REQUIREMENT

DigiVox Telecom, Inc. ("DigiVox") hereby requests that the Federal Communications Commission ("FCC") waive the WCS auction upfront payment deadline of 6:00 p.m. Eastern Time, April 4, 1997 as applied to DigiVox in this instance. For the reasons set forth below, DigiVox respectfully requests the FCC to allow DigiVox to make its upfront payment, in installments, by 6:00 p.m. Eastern Time on May 16, 1997. DigiVox stands ready to provide the FCC with any information that it may require regarding DigiVox's ability to make the required payment.

As explained in more detail below, the need for a waiver arises from the unprecedented, unique situation that WCS presents. The FCC has been required by Congress to act with unprecedented speed to formulate rules and conduct the WCS auctions. There has never before been a situation in which only a few days before upfront payments are due, the FCC has dramatically changed the rules to permit a use of the spectrum that was previously prohibited.

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Moreover, there may not be any other applicants whose business plan is predicated solely upon the newly authorized use of the spectrum. Thus, this waiver is not only necessary as a matter of fundamental fairness, but arises out of circumstances that almost certainly will never be replicated.

Background and Discussion

By a Notice of Proposed Rulemaking ("NPRM"), released November 12, 1996, the FCC proposed to establish a new Wireless Communications Service ("WCS") in the 2305-2320 and 2345-2360 MHz bands of spectrum. In its NPRM, the FCC stated its desire to allow WCS operators to use the spectrum to provide "the broadest range of services permitted under international agreements," including a variety of "fixed, *mobile*, SDARS and radio location services."^{1/}

Relying on the FCC's stated commitment to allowing the spectrum to be used for such applications, particularly for mobile uses, DigiVox became interested in the spectrum as a vehicle by which to provide PACS service. PACS is a low-power, low-tiered mobile wireless service that is fully compatible with the local exchange network and is interoperable with existing cellular systems. As such, PACS promises to facilitate the rapid deployment of PCS competitors as wireline local loop providers, providing economic and feature-rich services without sacrificing quality, reliability or security.

On February 19, 1997 the FCC adopted and released its Report and Order in the WCS

^{1/} See *In the Matter of Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service ("WCS")*, Notice of Proposed Rulemaking, GN Docket No. 96-228 (released November 12, 1996), at ¶ 6.

proceeding.^{2/} Contrary to the FCC's stated commitment to allowing mobile applications of the WCS spectrum, however, the Report and Order announced that the FCC adopted out-of-band emission limits "will . . . in fact make mobile operations in the WCS spectrum technologically infeasible."^{3/}

On March 11, 1997, DigiVox, together with the PACS Providers Forum, petitioned the FCC to reconsider the out-of-band emission limits that it adopted and to adopt instead less stringent limits proposed that would accommodate mobile use of the WCS spectrum.

On March 27, 1997, the FCC announced that 27 applications had been accepted for filing and that 16 incomplete applications had been received for participation in the WCS auction.^{4/}

On the evening of March 31, 1997 the Commission announced that it would adopt the less stringent emission limits as proposed by DigiVox, and on April 2, 1997, only two days before the deadline for submitting upfront payments for the WCS auction, the FCC officially released a Memorandum Report and Order by which it adopted less stringent out-of-band emission limits that would allow for mobile use of the WCS spectrum as proposed by DigiVox throughout the rulemaking proceeding.^{5/}

DigiVox's business plan is to provide mobile PACS service over the WCS spectrum.

^{2/} See *In the Matter of Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service ("WCS")*, Report and Order, GN Docket No. 96-228 (released February 19, 1997).

^{3/} *Id.* at ¶3.

^{4/} See *Auction of Wireless Communications Service (WCS), Status of Applications to Participate in WCS Auction*, Public Notice, Report No. AUC-97-14-B (Auction No. 14), DA 97-636 (released March 27, 1997).

^{5/} See *In the Matter of Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service ("WCS")*, Memorandum Report and Order, GN Docket No. 96-228 (released April 2, 1997).

However, until only two days ago, on April 2, 1997, when the Commission finally agreed to out-of-band emission limits that would allow for mobile services in the WCS spectrum, DigiVox's investors had no guarantee that DigiVox would be able to implement its proposal to provide mobile service in the WCS spectrum. Although DigiVox's investors had conducted substantial due diligence and expressed their willingness to make the investments necessary to implement DigiVox's business plan, they were unwilling to devote the time and resources to structure and finalize the financing in the face of an FCC order that announced flatly that a mobile PACS service could not be provided in the WCS spectrum. When the FCC earlier this week, changed the rules to permit PACS, the investors once again expressed their enthusiasm and willingness to provide the necessary financing. Nevertheless, the financing cannot be structured and finalized in a mere three or four days.

DigiVox requests that the FCC give it as much time as it would have had had the February 19, 1997 Report & Order announced that PACS services would be feasible in the WCS spectrum. Because the current April 4, 1997 upfront payment deadline falls 44 days from the release of the February 19, 1997 Report & Order, DigiVox is requesting 44 days, until May 16, 1997, to make its payment. In fact, however, DigiVox anticipates that it will be able to finalize these arrangements and make the full upfront payment well in advance of May 16, 1997.

Given the extremely short period of time that the FCC allowed for potential applicants to react to the new emission limits, DigiVox respectfully submits that the equities and public interest justify a limited waiver of the Commission's upfront payment deadline in this instance. Grant of this waiver will not unduly prejudice the rights of other auction participants and will pose no additional drain on the FCC's resources.

Further, because few bidders have applied to participate in the WCS auction, and

considering the attrition rate that normally occurs between the filing of short form applications and the payment deadline in similar auctions, the FCC will have a small number of payments to process in the WCS auction, and this request should not impose an unreasonable burden on the FCC.

Conclusion

For the foregoing reasons, DigiVox Telecom, Inc. respectfully requests the FCC to allow DigiVox to make its upfront payment, in installments, by 6:00 p.m. Eastern Time on May 16, 1997.

Respectfully submitted,

DIGIVOX TELECOM, INC.

By: 

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April 4, 1997

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

In re:)
) GN Docket No. 96-228
Amendment of the Commission's Rules to)
Establish Part 27, the Wireless)
Communications Service)

To: The Commission

DECLARATION UNDER OATH


I, John Prawat, hereby declare under oath as follows:

1. I am President and CEO of DigiVox Corporation; and
2. I have reviewed the foregoing Request for Waiver of Upfront Payment

Requirement, and the facts set forth therein, except those of which official notice may be taken, are true and correct to the best of my knowledge, information and belief.

I hereby declare under penalty that the foregoing is true and correct.

Respectfully submitted,



John Prawat

April 4, 1997